INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	4
Argument	7
Conclusion	16
Appendix	17

CITATIONS

Cases:	
Bell v. *Treasurer of Cambridge*, 310 Mass. 484	9
Blake v. *United States*, 103 U. S. 227	6, 12, 13
Burton v. *United States*, 202 U. S. 344	9
In re Obergfell, 239 N. Y. 48	9
Keyes v. *United States*, 109 U. S. 336	12
McElrath v. *United States*, 102 U. S. 426	12
McKannay v. *Horton*, 151 Cal. 711	9, 10, 11
McMullen v. *United States*, 96 F. (2d) 574	7
Mullan v. *United States*, 140 U. S. 240	12
State ex rel. Blake v. *Levi*, 109 W. Va. 277	9, 11
State ex rel. Giles v. *Burke*, 101 Utah 48	9
State ex rel. Olson v. *Langer*, 65 N. D. 68	9, 10
United States v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337	14
United States v. *Jackson*, 280 U. S. 183	14
United States v. *McLean*, 95 U. S. 750	15
United States v. *Tyler*, 105 U. S. 244	15
Wallace v. *United States*, 257 U. S. 541	6, 12, 13
Statutes:	
Act of June 30, 1882, Sec. 1, c. 254, 22 Stat. 117, 118 (10 U. S. C. 942)	4, 13, 15
Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 811, 118th Article of War (10 U. S. C. 1590)	3, 12
Criminal Code, Sec. 113 (18 U. S. C. 203) (Act of March 4, 1909, Sec. 113, c. 321, 35 Stat. 1109, as amended by the Act of October 8, 1940, c. 762, 54 Stat. 1021)	2, 8, 9, 13
10 U. S. C. 1517, 1519 (46th and 48th Articles of War)	11
Miscellaneous:	
Rules of Crim. Proc., Rule 5, 18 U. S. C. § 688 ff. 11	8

578355—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 671

JOSEPH IRVING MCMULLEN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19–26) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1943 (R. 26). The petition for a writ of certiorari was filed on February 4, 1944 (R. 26). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether an officer of the United States Army, upon being convicted of a violation of

Section 113 of the Criminal Code, may be dismissed from the service pursuant to that statute notwithstanding the pendency of an eventually successful appeal from the judgment of conviction.

2. Whether an Army officer may be removed through the appointment by the President, with the advice and consent of the Senate, of another officer in his place.

3. Whether, in computing forty years' service for purposes of retirement under Section 1 of the Act of June 30, 1882, c. 254, 22 Stat. 117, 118 (10 U. S. C. 942), time served on the retired list should be included in the computation.

4. Whether retirement under the Act of June 30, 1882, is automatic upon filing of an application, or whether action by the President or other officer is necessary to carry retirement into effect.

STATUTES INVOLVED

Section 113 of the Criminal Code (18 U. S. C. 203) (Act of March 4, 1909, ch. 321, § 113, 35 Stat. 1109) provides:

> Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or

> agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

The Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 811, 118th Article of War (10 U. S. C. 1590), provides:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

Section 1 of the Act of June 30, 1882 (c. 254, 22 Stat. 118; 10 U. S. C. 942) provides:

> when an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list.

STATEMENT

Petitioner in 1940 brought suit in the Court of Claims for pay and allowances as a Colonel in the United States Army, from May 9, 1936, to date of suit. After a hearing before a commissioner, the Court of Claims made findings of fact (R. 7–18) which are uncontested here, and which may be summarized as follows:

Petitioner served in the United States Army from April 11, 1896, until September 20, 1906, when he was retired on account of physical disability, with the rank and commission of a Second Lieutenant (R. 7). He was recalled to active duty on March 28, 1916, and served on active duty until May 1936. From time to time he was regularly promoted in rank until on November 1, 1932, he became a Colonel stationed at Washington, D. C. in the Office of the Judge Advocate General (R. 7).[1]

[1] When he was called on March 28, 1916, petitioner served as a Second Lieutenant, U. S. A., retired, on active duty. On June 3, 1916, under provisions of the Act of March 4, 1915, petitioner was restored to active duty as a First Lieutenant (R. 7).

On June 6, 1935, petitioner was indicted in the Supreme Court of the District of Columbia for violation of Section 113 of the Criminal Code (18 U. S. C. 203). The indictment charged that he had received compensation of $1,500 while a Colonel in the United States Army for services rendered to the Cuban-American Manganese Corporation in connection with proposed legislation in which that company was interested. (R. 9.)

On April 11, 1936, before the trial on the indictment, petitioner addressed a written communication through the Judge Advocate General to the Adjutant General, making application for retirement under the Act of June 30, 1882 (10 U. S. C. 942) (R. 10). No action was ever taken on this application and it was never laid before the President for his approval or disapproval (R. 11). Petitioner was duly tried upon the indictment and convicted on April 30, 1936 (R. 9). Motion for a new trial was overruled, and on May 8, 1936, petitioner was fined $1,000 and sentenced to six months in jail (R. 9).

The Secretary of War thereupon requested an opinion of the Attorney General as to the military status of petitioner as a consequence of the conviction, and on May 21, 1936, the Attorney General ruled that, upon the date of entry of the judgment of conviction and sentence (May 8, 1936), petitioner immediately became incapable of holding any office of honor, trust, or profit under

the Government of the United States (R. 11). On May 28, 1936, the War Department issued Special Order No. 127, announcing that "by operation of" 18 U. S. C. 203, petitioner "ceased to be an officer of the Army on May 8, 1936." Petitioner was advised accordingly. (R. 11.)

On May 25, 1936, the President of the United States submitted to the Senate of the United States for its advice and counsel the nomination of Lt. Col. James Howard Laubach, Q. M. C., to be Colonel from May 14, 1936 (R. 11). On May 30, 1936, the President withdrew this nomination, writing the following note:

> This message is submitted for the purpose of correcting the dates of rank of the nominees due to the separation of Colonel Joseph I. McMullen, Judge Advocate General's Department, as of May 8, 1936, from the Army through the operation of Section 203, Title 18, United States Code. (R. 11.)

On the same date, the President again sent to the Senate the nomination of Lt. Col. Laubach, Q. M. C., to be Colonel from May 9, 1936, to fill the vacancy created through petitioner's separation from the Army (R. 12). The Senate confirmed the appointment on June 8, 1936, and the appointment was formally completed June 17, 1936 to date from May 9, 1936[2] (R. 14).

---

[2] The petitioner makes no point of the fact that the appointment was related back to May 9, 1936. This procedure appears to be correct. See *Blake* v. *United States*, 103 U. S. 227; *Wallace* v. *United States*, 257 U. S. 541.

On May 21, 1938, the United States Court of Appeals for the District of Columbia reversed the judgment of conviction and remanded the case for a new trial (R. 10).[3] On June 30, 1939, a *nolle prosequi* was entered by the Government and the criminal proceedings against petitioner were abandoned (R. 10).

Thereupon, on September 11, 1940, petitioner instituted suit to recover pay and allowances from May 9 to May 28, 1936, as a Colonel with more than thirty years service on active duty in the United States Army, and to recover $375 a month representing pay and allowances from May 29, 1936, to the date of suit, as a Colonel with more than thirty years service on the retired list of the United States Army (R. 1–6).

On the basis of the foregoing facts the Court of Claims dismissed the petition (R. 26).

ARGUMENT

The Court of Claims held (1) that the disqualification clause of Section 113 of the Criminal Code is not stayed by appeal from a conviction thereunder; (2) that an officer may be dismissed from the service by the appointment and confirmation of another officer to fill his place; and (3) that petitioner was not entitled

[3] The Court of Appeals held the petitioner was entitled to a new trial because the trial court erred in refusing to grant his motion for a bill of particulars. *McMullen* v. *United States*, 96 F. (2d) 574 (App. D. C.)

to be retired since he had not served 40 years in active service (R. 19–26). We submit that this decision is clearly correct, and raises no substantial question requiring review by this Court.

1. The petition does not raise and this case does not present the question whether an officer convicted of violating Section 113 of the Criminal Code may, after reversal of the conviction, again be appointed to office or be reinstated to the one he formerly held. Petitioner did not seek reinstatement through administrative or judicial proceedings after reversal of his conviction. He contends merely that he is entitled to pay and allowances from the date of removal to the date of suit upon the ground that the pendency of an appeal from the judgment of conviction prevented his removal under Section 113 of the Criminal Code. Settled precedent and reasons of public policy require the rejection of his contention.

(a) Section 113 of the Criminal Code provides that any officer of the United States who violates its provisions "shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States." Petitioner's appeal from the judgment of conviction concededly stayed execution of the judgment pending the appeal (Rules of Crim. Proc., Rule 5; 18 U. S. C. § 688 ff.). But the disqualification

to hold office was no part of the judgment of conviction, for the statute "by its own force, without the aid of such words in the judgment" makes one convicted under it incapable of holding any office under the Government of the United States. See *Burton* v. *United States,* 202 U. S. 344, 369. Under similar provisions in state statutes, it has been uniformly held that the disqualification to hold office is not a part of the punishment but a consequent of the conviction; hence, it becomes effective immediately upon the judgment of conviction and is not stayed by an appeal. *McKannay* v. *Horton,* 151 Cal. 711; *Bell* v. *Treasurer of Cambridge,* 310 Mass. 484; *In re Obergfell,* 239 N. Y. 48; *State ex rel. Olson* v. *Langer,* 65 N. D. 68; *State ex rel. Giles v. Burke,* 101 Utah 48; *State ex rel. Blake* v. *Levi,* 109 W. Va. 277.

This construction is warranted by the considerations of policy underlying the disqualification clause of Section 113. The manifest purpose of such a clause is to protect the public interest by effecting the immediate removal from office of those found guilty of offenses so serious in character as to impair their ability to continue as public servants. If an appeal from a conviction should have the effect of staying the disqualification, the object of the statute would in many cases be wholly defeated. A convicted official might continue to serve for an indefinite period pending appeal to various courts, perhaps for the entire term of his

appointment. Public confidence in government officials—an essential ingredient in voluntary obedience to laws—would obviously be impaired if persons convicted of misconduct in office, and perhaps detained in jail pending appeal, were entitled to continue in office as a matter of legal right. *State ex rel. Olson* v. *Langer,* 65 N. D. 68, 94; *McKannay* v. *Horton,* 151 Cal. 711, 719. Such a rule could produce the anomaly of a convicted official discharging his official functions in prison and retaining his "privileges, honors and emoluments" for a substantial period of time until his conviction should be affirmed or review denied by the highest Court. See *State ex rel. Olson* v. *Langer,* 65 N. D. 68, 94–95.

(b) Petitioner argues that public policy can adequately be served merely by relieving him from duties during the pendency of the appeal (Pet. 24). But the policy dictating the need for disqualification of convicted officials would not be satisfied by such a dilution of the rule. As the court below pointed out (R. 22), suspension would leave important functions in a state of catalepsy, with the incumbent unable to discharge his duties and a successor excluded from appointment. Considerations of occasional unfairness to the individual must here yield to the broader interests of policy, for the rights of an official under conviction for malfeasance in office "are subordinate to the public weal. The possibility

that his conviction may ultimately be reversed cannot weigh against public dissatisfaction with and public mistrust of him pending appellate hearing." *State ex rel. Blake* v. *Levi,* 109 W. Va. 277, 279–280; see *McKannay* v. *Horton,* 151 Cal. 711, 719–720.

Since after his conviction petitioner was "incapable of holding any office * * * under the Government of the United States," he was properly removed from his post of Colonel in the United States Army, concededly an office under the Government of the United States.[4]

2. Regardless of the effect of the judgment of conviction, however, petitioner was properly removed from office as a result of the appointment of Colonel Laubauch to petitioner's place, through nomination by the President and confirmation by the Senate.

(a) Petitioner invokes Section 1 of the Act of June 4, 1920, which prohibits the dismissal of any officer in time of peace except pursuant to the sen-

[4] Petitioner cites cases (Pet. 19–21) holding that civil rights may be forfeited as a penalty for desertion only after the conviction and sentence by the court martial have been approved by the proper authority. These cases are not relevant here. Courts-martial have exclusive jurisdiction of the offense of desertion, but by statute their sentence may not be carried into execution until after the whole proceedings have been approved (46th and 48th Articles of War; 10 U. S. C. 1517, 1519).

tence of a court-martial, and empowers the President to "drop from the rolls of the Army any officer" who for three months has been absent from duty without leave or has been imprisoned after final conviction (10 U. S. C. 1590; 118th Article of War). It is well settled, however, that none of the limitations in such a statute affects the President's "power of removal when exercised by or with the consent of the Senate" (*Blake* v. *United States,* 103 U. S. 227, 237), and that "the President with the consent of the Senate may effect the removal of an officer of the Army or Navy by the appointment of another to his place." *Wallace* v. *United States,* 257 U. S. 541, 545; *McElrath* v. *United States,* 102 U. S. 426; *Keyes* v. *United States,* 109 U. S. 336; *Mullan* v. *United States,* 140 U. S. 240.

Petitioner argues (Pet. 35–37) that this power can be exercised only where there is an intention to oust the officer holding the position, and that here there was no such intention since both the President and the Senate believed petitioner was already separated from the service by virtue of his conviction. But the same situation was present in the *Wallace, Blake,* and other cases cited above. There the President and the Senate believed that the service of the officer replaced had been effectively terminated before his successor was appointed; yet this Court held that regardless of the validity of such termination, the officer was

effectively removed and superseded through the appointment of his successor and hence was no longer entitled to pay.[5]

(b) Petitioner contends that having served forty years, he was, under the Act of June 30, 1882, automatically retired upon making application therefor; consequently, that the appointment of Colonel Laubauch was to a vacant office and could not operate to dismiss petitioner from the service.[6] This contention finds support in neither the statute nor in the facts.

The Act of June 30, 1882, provides that the officer, in order to be retired from active service, must have "served forty years either as an officer

[5] Petitioner further contends that the rule laid down in the *Blake* case has been changed by statutory revisions. The amendments relied upon by petitioner (Pet. 38–39), however, do not substantially alter, for present purposes, the statutory provisions considered in the *Blake* and *Wallace* cases, *supra*, and relate only to the power of the President alone to dismiss an officer. The limitations which they may have imposed upon the President's power of removal, like the limitations in the statutes considered in the *Wallace* and *Blake* cases, cannot affect "the President's power of removal when exercised by and with the consent of the Senate." *Wallace* v. *United States*, 257 U. S. 541, 545; see *Blake* v. *United States*, 103 U. S. 227, 236.

[6] On October 8, 1940, Section 113 of the Criminal Code was amended to make it inapplicable to retired officers of the military services (54 Stat. 1021, c. 762). Until then it operated upon all offices under the Government of the United States; consequently, petitioner's retirement could not affect his disqualification by operation of Section 113 of the Criminal Code.

or soldier" (see p. 4, *supra*). In order that petitioner can claim forty years of service (which he alleges consists of the period between April 11, 1896 and April 11, 1936), he must include the 9½-year period from September 20, 1906, when he was retired on account of physical disability, to March 28, 1916, the date upon which he was recalled to active duty.

The consistent practice of the War Department since passage of the Act in 1882, however, has been to consider only active service in determining whether the 40 years required by the statute have accrued (see Appendix, pp. 17–18, *infra;* R. 24). This construction, which apparently has never been questioned, is entitled to great weight in determining the proper construction to be given the statute. *United States* v. *Cerecedo Hermanos, y Compañia,* 209 U. S. 337; *United States* v. *Jackson,* 280 U. S. 183. Additional support for this construction is to be found in the provision of the Act that retirement is to be "from *active* service." To include in the 40-year period years spent in retirement, would, as the court below observed, lead to the anomaly of retiring an officer whose years of "service" had for the most part been spent inactively on the retired list, merely because he happened to be in active service at the end of the fortieth year, for however brief a period. While an officer on the retired list may

for some purposes be regarded as in military service (*United States* v. *Tyler,* 105 U. S. 244), petitioner was correctly held not to be in service within the meaning of the 1882 retirement Act.

In any event, the Act of 1882 provides for retirement of an officer if he "has served forty years either as an officer or soldier in the regular or volunteer service," and "if he make application therefor to the President" (see p. 4, *supra*). The condition to retirement—forty years of service—is not a fact easily susceptible of immediate and uncontroversial determination, as the present case shows; and the requirement that application be made to the Chief Executive implies that some responsive action will be taken by the latter. Consequently, it cannot be said that an officer is automatically retired merely upon filing an application. Some affirmative action is required to place the officer in a retired status, whether the President acts rightly, wrongly or not at all. Cf. *United States* v. *McLean,* 95 U. S. 750. It is undisputed that petitioner was on the active list of Army officers prior to May 9, 1936, when his successor's appointment took effect. Since petitioner's application was never submitted to or acted on by the President (R. 10–11) petitioner was never retired under the 1882 Act.

CONCLUSION

The decision below is correct and is clearly sustained by numerous decisions of this Court. There is no conflict and the case presents no important question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

PHYLLIS J. CAMPBELL,
Attorney.

MARCH 1944.